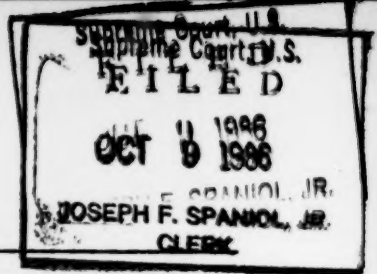


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86-633

NO.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

SOPHON POTISOPHON
and
SOMCHIN POTISOPHON

PETITIONERS

-V-

THE UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
FILED OCTOBER __, 1986

36PP



QUESTION PRESENTED FOR REVIEW

I.

WHETHER THIS COURT SHOULD ADOPT A RULE OF
LAW EXTENDING THE HOLDING OF JACKSON V.
VIRGINIA REQUIRING THE GOVERNMENT IN A
CRIMINAL PROSECUTION TO EXCLUDE EVERY
REASONABLE HYPOTHESIS OF INNOCENCE WHERE
THE GOVERNMENT'S CASE RESTS SUBSTANTIALLY
ON CIRCUMSTANTIAL EVIDENCE?



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Petitioners, Sophon and Somchin Potisophon respectfully pray that a Writ of Certiorari issue to review the opinion of the United Court of Appeals for the Sixth Circuit entered on July 24, 1986.

OPINION BELOW

The Order of the United States Court of Appeals for the Sixth Circuit affirming the judgment was rendered on July 31, 1986. [Appendix, hereinafter A., p. 1].

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit affirming the judgment was rendered on July 31, 1986. No rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).



CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

No person shall...be deprived of life, liberty, or property, without due process of law....



STATEMENT OF CASE

This action was initiated by the United States Immigration and Naturalization Service (hereinafter, INS), which charged Sophon Potisophon, his present wife Phenilope Moore Potisophon, and his ex-wife, Somchin Potisophon, with conspiracy to enter into a sham marriage so as to defraud the INS.

Sophon Potisophon was found guilty of conspiring to make false statements to the INS as charged in Count One of the Indictment; and aiding and abetting false statements to the INS, as charged in Counts Five and Eight of the Indictment.

Somchin Potisophon was convicted only under Count One of the Indictment, conspiring to make false statements of the INS.



Sophon Potisophon was born in Bangkok, Thailand on November 25, 1942 (Transcript of Evidence, hereinafter T.E., p. 2-349). He married Somchin Potisophon on March 12, 1970. (T.E., p. 2-327). Sophon and Somchin were divorced in Thailand in 1978, but were remarried that same year. (T.E., p. 2-327-329.) Sophon and Somchin and their son arrived in the United States on or about August 16, 1981, as visitors. (T.E., p. 2-330). A year-and-a-half later, on February 16, 1983, Somchin married Sonny Penn. On June 14, 1983, Sophon Potisophon married Phenilope Moore (hereinafter, Penny) in Lexington, Kentucky. (T.E., p. 2-350 and 352). Subsequent to that time, Sophon and Penny filed an application with the INS to obtain permanent resident status for Sophon. The INS notified Sophon and Penny that the divorce of Somchin and Sophon, at the Thai Consulate in Chicago,



Illinois, was invalid for INS purposes. (T.E., p. 1-143).

Sophon and Somchin obtained a second divorce in Lexington, Kentucky on July 6, 1984. On July 12, 1984, Sophon and Penny remarried in Lexington. In October 1984, Sophon and Penny filed a new application for Sophon's permanent resident status. The INS subsequently charged Sophon, Penny and Somchin with conspiracy to enter into a sham marriage to defraud the INS so that Sophon could obtain permanent residence status in the United States.

FACTS ADDUCED AT TRIAL

The first witness, Sanagan Tantasook, (hereinafter, Susan) testified from notes which she prepared for trial, because, as she said, "I can't remember I know something." (Tantasook, T.R., p. 22). She said she knew Sophon and

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Somchin (Petitioners) since 1977. (T.E., p. 1-8). Somchin introduced Penny to her as Sophon's wife. (T.E., p. 1-15). According to Susan, Somchin told her that Sophon married Penny "because it was the one way the best they go to stay here legal." (T.E., p. 1-16). After Sophon and Somchin were divorced, she was asked to be their son's guardian. (T.E., p. 1-22). In fact, she filed a petition to adopt Petitioners' son. (T.E., p. 1-24).

She testified that she saw Sophon and Somchin living together in 1981-1982 (before Sophon's marriage to Penny). (Tantasook, T.R., p. 1-26). She never went to 224 Bassett Avenue, where Penny and Sophon lived. (Tantasook, T.R., p. 1-36).

Susan testified that she wrote some letters to Somchin the day that the immigration agents went to the hospital where she worked and talked to her. That



same day, she signed a statement written by an immigration agent. (Tantasook, T.R., p. 1-56 & 59). She stated in the letters to Somchin that she did not know anything about Sophon and Phenilope's marriage, and indicated that the FBI agents "invaded" her. (Tantasook, T.R., p. 1-59). She also wrote in the letters that the immigration agent had accused her of telling untruths.

James Craycraft testified that he met Somchin and Sophon in 1982 when he went to work for them at Mr. Eggroll, Petitioners' Thai restaurant. (T.E., p. 1-70). He testified that he had worked and quit on several occasions. (T.E., p. 1-71). He became dissatisfied because he claimed all his wages were not paid. (T.E., p. 1-79). Craycraft testified that he resented the Petitioners. (Craycraft, T.R., p. 1-79).



Craycraft claimed to have heard Somchin say that Sophon has married Penny "in order to stay here." (T.E., p. 1-71). He testified that he had helped the Potisophons move to and from three different locations. (T.E., p. 1-73). However, he could not recall if it was before or after Penny and Sophon were married. (T.E., p. 1-90).

He said he spent a night sometime in late 1981 or early 1982 at Somchin's residence and had seen Sophon and Somchin there. (Craycraft, T.R., p. 1-85). [However, Penny and Sophon who were first married in June, 1983, were married after Craycraft saw Sophon spend the night at Somchin's.]

Joe Norris testified that he was serving time in jail for convictions of rape, sodomy, and "aiding in a rape." (Norris, T.R., p. 1-100). He indicated that he was a spurned lover: Penny Moore



refused to marry him, and therefore was testifying against Petitioners. Norris testified that he and Penny Moore were dating between August, 1983 and June, 1984, (after she first married Sophon). (Norris, T.R., p. 1-101). He also said that Penny told him she married Sophon "for his money" and that she said "something about a green card...or citizenship or something." (Norris, T.R., p. 1-102).

Mary Richardson testified that Penny told her that she wanted a divorce from Sophon, and that "she wanted her money." (T.R., p. 1-123). John Tantasook (Susan's husband) told Mary that he wanted her to help get back at Sophon, because Sophon had "ripped him off" for \$2,000. (T.R., pp. 1-124; 1-129). She also testified that James Craycraft admitted he was very angry at

Sophon, and that he wanted to get back at Sophon. (Richardson, T.R., p. 1-30).

Bruce Firkey, an INS agent, testified that Penny Moore Potisophon had filed for permanent resident status for Sophon, her husband. (Firkey, T.R., p. 1-136). He informed them that the divorce of Sophon and Somchin Potisophon in the Chicago Thai Consulate was invalid for immigration purposes; therefore, he notified them to get another divorce. Sophon and Somchin Potisophon divorced again and Penny and Sophon were married again in Lexington. Mr. Firkey believed that the marriage between Sophon and Penny was improper because Sophon was allegedly unable to identify which of Penny's brothers resided at 224 Bassett. [Penny's three brothers resided there off and on.] Mr. Firkey actually approved the intital application. (Firkey, T.R., p. 1-157).



John Rampulla testified that he was a Vice President of mortgage loans for Kentucky Central Life Insurance Company, and that Sophon's and Somchin's names were on a mortgage in 1983 for a condominium at Terrace Green Condo-Apts. (Rampulla, T.R., p. 1-159).

Donna Klemann testified that she worked for Lakes Apts where Somchin lived, and that Sophon had signed the lease in January, 1984. (Klemann, T.R., p. 1-161).

Mary Bollock, a real estate broker, had an offer in November, 1984, from Sophon to purchase property located at 487 Grayson Lake Drive in Lexington, Kentucky. She did not know whether Sophon and Somchin were husband and wife at that time. (Bollock, T.R., p. 1-172). Although Sophon, Somchin and their son were present, she indicated that Sophon was the only one who was actually making



the inquiry about the house. (Bollock, T.R., p. 1-175).

Othip Onwan knew Sophon and Somchin before her employment at their Mr. Egg Roll restaurant. (Onwan, T.E., p. 2-189). She worked there from early 1983 until about May, 1983. (Onwan, T.E., p. 2-191). She said she left the restaurant because of "bad feelings" when Somchin asked her to marry Sophon. (Onwan, T.E., p. 2-191). This was to help Sophon get a "green card". (Onwan, T.R., p. 2-194). Later, Sophon asked her if she was going to marry her. (Onwan, T.R., p. 2-195). He wanted her to help him out so Sophon and his family could "stay here and his kid could go to school. (Onwan, T.R., p. 2-195).

At the close of the Government's case, Petitioners' motions for Judgments of Acquittal, based upon the



insufficiency of evidence, were overruled.

Steve Moore was the first witness for the defense. He is Penny Moore Potisophon's brother. (Moore, T.R., p. 2-214). He stated that he resided at 224 Bassett Avenue with his mother, his sister Penny, and her husband Sophon Potisophon. (Moore, T.R., p. 2-214). He would see Penny and Sophon in the mornings and evenings; on occasion, he had breakfast, lunch and dinner with them; watched t.v. with them, and went out to night-spots with them. He has seen Sophon Potisophon bring groceries to the house. He had to walk through their bedroom every morning, because of the way that their room was situated. (Moore, T.R., pp. 2-214; 2-216).

The next defense witness was Michael Haley. He testified that he is employed as a maintenance man in the



Lexington Building in downtown Lexington, Kentucky. (Haley, T.R., p. 2-225). He met Sophon, Penny, and Somchin at Mr. Egg Roll Restaurant in Lexington, Kentucky, where he was requested to fix a pipe. (Haley, T.R., p. 2-225). For a period of about 4 years, he was there on a frequent basis. Haley did other work for Sophon. (Haley, T.R., p. 2-227). Sophon asked Haley to repair Penny's car and repair Somchin's car on different occasions. (Haley, T.R., p. 2-228). One time, Sophon requested that Haley give Sophon an estimate for remodeling a bathroom at 224 Bassett Avenue. Sophon and Penny lived there, and that they needed another bathroom. (Haley, T.R., p. 2-229). He testified that Sophon told him that he was married to Penny. (Haley, T.R., p. 2-229). Haley also testified to the fact that on several occasions Sophon asked him to pick up Penny from work when she



was working at a different restaurant. He described Sophon's and Somchin's as a business relationship, and not a marital relationship. (Haley, T.R., p. 2-232). On many occasions, he would be at Mr. Egg Roll until closing time, and Sophon and Somchin would leave separately. (Haley, T.R., p. 2-233). (Haley, T.R., p. 2-236). Occasionally, he saw Sophon give Penny money for gas or groceries, and he frequently gave her his car keys. (Haley, T.R., p. 2-236). Haley testified that he had frequent conversations with Sophon regarding the education of Sophon's son, Somphon. He testified that the reason Sophon wanted to buy a house for Somchin in a particular neighborhood was that his son would be able to attend school in a certain school district.

Somphon Potisophon testified that he lived with his mother, Somchin, and had lived with her for the past two



years. (Somphon, T.R., p. 2-260). He testified that when his father Sophon did stay at the same house or apartment where he and Somchin lived, Sophon always stayed in Somphon's room and never with Somchin, his ex-wife. (Somphon, T.R., p. 2-262). He also said that he and James Craycraft had a fight when Craycraft made a homosexual advance towards him, and that this caused Sophon to fire Craycraft. (Somphon, T.R., p. 2-263 & 264).

The next defense witness was Steven Earl Garland, an optometrist. (Garland, T.R., p. 2-270). He testified that he and Susan Tantasook had a conversation at Mr. Egg Roll Restaurant one evening in which Susan Tantasook admitted that immigration authorities were threatening and harrassing her to testify against Sophon. (Garland, T.R., p. 2-271). He stated that Sophon

introduced Penny as his wife. (Garland, T.R., p. 2-272). He said that Susan Tantasook stated that the government was trying to make a case against Sophon, Penny and Somchin and that it was totally incorrect and not true. (Garland, T.R., p. 2-273). He testified that when he went to Somchin's home, he did not observe any belongings that made him believe that Sophon lived in the same home with Somchin. (Garland, T.R., p. 2-275).

Chalon Buriratana testified that he was 35 years of age, that his occupation in the United States was a cook for Bangkok restaurant, and that he was a police officer when he was in Thailand. (Buriratana, T.R., p. 2-287). He had worked for and known Sophon since 1983. Sophon had introduced Penny as his wife in 1983. (Buriratana, T.R., p. 2-287). He had been in Somchin's home on



many occasions and was told that her son lived with her, but that Sophon did not live with her. He described the relationship between Sophon and Penny as that of husband and wife, and described the relationship of Sophon and Somchin as being business-like. (Buriratana, T.R., p. 2-288).

Penny Potisophon was the next defense witness. She testified that she first met Sophon around March, 1983. (Phenilope Potisophon, T.R., p. 2-292). She said that she had known Joe Norris since she was seventeen years old, and had refused to marry him man once she met Sophon Potisophon. She found that Sophon treated her well and that he provided security for her. She decided to marry Sophon after a period of courtship. (Penny Potisophon, T.R., p. 2-95). After their marriage, she (Penny), Sophon, her mother, and her brothers lived at 224



Bassett Avenue. She testified that she wrote a letter to Immigration stating that she wanted to drop her petition requesting residency for Sophon. She did this because Sophon had purchased a house with his ex-wife behind her back, and she was very upset with him. She still loved Sophon but thought it would be best to break up. (Penny Potisophon, T.R., p. 2-300). She denied that she was paid any amount of money to marry Sophon, but that she married him for love and affection. (Penny Potisophon, T.R., p. 2-302). She also testified that she consummated her marriage with sexual relations with Sophon. (Penny Potisophon, T.R., p. 2-304).

Somchin Potisophon next testified that she married Sophon in 1970, in Bangkok, Thailand. They have two children, a son and a daughter. (Somchin Potisophon, T.R., p. 2-327). She



testified that they had marital problems in 1978 and were divorced, but remarried for the benefit of their children. (Somchin Potisophon, T.R., p. 2-328). She testified that it is the Thai custom that the man of the family to take care of his wife and provide for her even if there is a separation. Otherwise, there is a very strong stigma. They reconciled and came to the United States in 1981. They brought their son to go to school here. (Somchin Potisophon, T.R., p. 2-330). She testified that they operated the Mr. Egg Roll restaurant together because it took both of them to run it. Neither of them could afford to buy the other out once they were divorced in 1982. (Somchin Potisophon, T.R., p. 2-334 & 2-335). She testified that Sophon continued, even after the divorce, to provide aid and support to Somchin and their son. Since she did not read or



write english, or speak it very well, Sophon took the responsibility of entering into leases, and mortgages. Somchin testified that she filed a single tax return (Somchin Potisophon, T.R., p. 2-342), and that she did not enter into a sham or scheme whereby her husband would be married to another woman to obtain permanent resident status. (Somchin Potisophon, T.R., p. 2-342).

Sophon Potisophon, the final defense witness, testified that he never offered Oithip Onwan to marry him for money. (Sophon Potisophon, T.R., p. 2-349). He married Penny Moore because he loved her. (Sophon Potisophon, T.R., p. 2-350). He indicated that he filed a joint federal and state tax return in his name and Penny's name, for the years 1983 and 1984. He testified that he first married Penny on June 24, 1983, and opened a joint bank account. (Sophon



Potisophon, T.R., p. 2-352). He testified that he paid Penny's medical bills; provided her with a car; purchased insurance in his name and in her name; introduced her as his wife in public; and that he consummated his marriage to Penny with sexual relations. (Sophon Potisophon, T.R., p. 2-355). He stated that he lived at 224 Bassett Avenue, Lexington, Kentucky, since the time of his marriage to Penny. He testified that the reason he signed his name to the lease, the deed, and the mortgage for Somchin was to help his ex-wife and his son Somphon, because his ex-wife did not read or write english. (T.R., pp. 2-357, 358).



REASONS FOR GRANTING THE WRIT

WHERE THE GOVERNMENT'S CASE-IN-CHIEF RESTS SUBSTANTIALLY ON CIRCUMSTANTIAL EVIDENCE, THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT SHOULD REQUIRE THE EXCLUSION OF EVERY REASONABLE HYPOTHESIS OF INNOCENCE IN ORDER TO FULLY EFFECTUATE THE GOVERNMENT'S BURDEN OF PROOF AS SET FORTH IN JACKSON V. VIRGINIA AND IN RE WINWHIP.

It is an elementary principle of constitutional law that the burden is on the Government to prove that an accused has committed an act to bring him within a criminal statute, and that the Government must prove each essential element of the crime charged. Johnson v. Florida, 391 U.S. 596, 88 S.Ct. 1713, 21 L.Ed.2d 838 (1968); Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). Of course, a conviction which is not supported by evidence as to a crucial element of the offense violates the guarantee of due process of law. Harris v. United States,



404 U.S. 1232, 92 S.Ct. 10, 30 L.Ed.2d 25
(1971).

In discussing the Government's
burden, this Court has stated that:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is the prime instrument for reducing the risk of convictions resting on factual error....

* * *

'a person accused of a crime *** would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.' [cite omitted].

* * *

To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue. [cite omitted].

...It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in



doubt where innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

[In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 1072-1073, 25 L.Ed.2d 368 (1970)].

While the reasonable-doubt standard is not in and of itself at issue herein, the type of evidence upon which a fact finder must rely is very much at issue. Obviously, circumstantial evidence may be relied upon by a jury to convict. However, Petitioners herein are submitting that in such cases as this where the circumstantial evidence relied upon by the Government also gives rise to reasonable hypotheses of innocence, then that evidence cannot at the same time establish proof" beyond a reasonable doubt." Accordingly, Petitioners submit

that where circumstantial evidence is as consistent with innocence as with guilt, the Government must then exclude every reasonable hypothesis of innocence.

Like the petitioner in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), "the question thus raised goes to the basic nature of the constitutional right recognized in the Winship opinion." [Id, 99 S.Ct. at 2786]. In analyzing the question raised in Jackson v. Virginia, the Court stated that "after Winship the critical inquiry and review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." [Id at 2788-2789]. Otherwise stated, "...the



relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Id at 2789 (emphasis an original)].

This Court has itself admitted that "circumstantial evidence may in some cases point to a wholly incorrect result." Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 137, ___ L.Ed. ___ (1954). Despite this assertion, the Court found that circumstantial evidence is intrinsically no different from testimonial evidence, stating that "in both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the



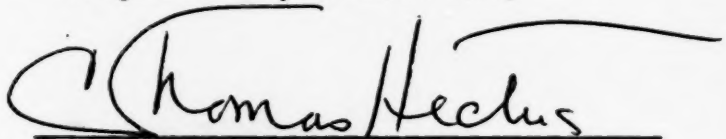
probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." Id at 137-138. Petitioners submit that this Court's opinion in Holland v. United States came at a time when a mere "modicum" of evidence would satisfy the relevant inquiry of the sufficiency of the evidence. However, after Winship and Jackson v. Virginia, a mere modicum of evidence by itself cannot "rationally" support a conviction beyond a reasonable doubt. Accordingly, the Government should then be required to exclude every reasonable hypothesis of innocence, where its case is based substantially on circumstantial evidence.

CONCLUSION

Because the jury verdict in this case rests substantially on circumstantial evidence, and further, because

that evidence is not inconsistent with every reasonable hypothesis of innocence, Petitioners respectfully request this Court to grant this Petition, and to review the Order of the Sixth Circuit Court of Appeals affirming Petitioners' judgments of conviction.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "C. Thomas Hectus". The signature is fluid and cursive, with a large initial "C" and a long horizontal flourish extending to the right.

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APPENDIX

No. 85-6055

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)

Plaintiff-Appellee)

vs.)

SOPHON POTISOPHON AND)
SOMCHIN POTISOPHON)

Defendants-Appellants)

O R D E R

BEFORE: MILBURN, BOGGS, Circuit Judges
and DEMASCIO, district Court
Judge*

This cause having come on to be
heard upon the record, the briefs and the
oral argument of the parties, and upon
due consideration thereof, the Court
finds that there is substantial evidence
to support the verdict of the jury and
that no prejudicial error has intervened.



Accordingly, it is ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/
Leonard Green, Chief Deputy

ISSUED AS MANDATE 8/22/86

COST: none

* The Honorable Robert E. DeMascio, U.S.
District Court Judge for the Eastern
District of Michigan, sitting by
designation.